

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MITEL CORPORATION;	:	CIVIL ACTION
MITEL INC.;	:	
MITEL (FAR EAST) LIMITED,	:	NO. 97-cv-4205
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
A&A CONNECTIONS INC.,	:	
d/b/a TELEQ and d/b/a	:	
FRANZ TELECOM INVESTMENTS;	:	
ANDREW F. SILVERMAN,	:	
	:	
Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J.

March 19, 1998

Plaintiffs, Mitel Corporation and its distributors in the United States, Mitel Inc. ("Mitel-USA") and in the Far East, Mitel Far-East Limited ("Mitel-Far East", collectively "Mitel") have instituted this breach of contract/copyright infringement action against defendants A&A Connections Inc. ("A&A Connections"), d/b/a Teleq and d/b/a Franz Telecom Investments ("FTI") and its president Andrew F. Silverman (collectively "A&A"). Mitel's claims spring from circumstances surrounding termination of a dealership agreement between Mitel-Far East and FTI (the "Complaint"). In response A&A filed four antitrust and four state law counterclaims ("A&A's Complaint"). Presently

before the court are Mitel's motion to dismiss A&A's Complaint and non-party Franz Telecom Investments, Inc.'s motion to intervene. Based on the following, Mitel's motion to dismiss is granted, in part, and Franz Telecom Investments Inc.'s motion to intervene is denied.

## **I. Background<sup>1</sup>**

Mitel manufactures internal telephone systems for organizations with multiple telephone extensions, commonly known as private business exchanges ("PBX systems"). Including Mitel, there are approximately four major manufacturers of PBX systems in the United States. Unsurprisingly, Mitel distributes its PBX systems in the United States through Mitel-USA and in the Far East through Mitel-Far East. Mitel-USA operates through independently owned authorized dealers ("Authorized Dealers") who are each given designated territories. New Mitel PBX systems are sold by Authorized Dealers exclusively. Installation and repair service, PBX subsystems, add-ons, upgrades and replacement parts are sold on a non-exclusive basis and therefore, Authorized Dealers compete with independent service organizations in this regard.

A&A Connections is an independent broker/service organization of Mitel PBX products. A&A Connections purchases

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<sup>1</sup> In response to Mitel's motion to dismiss A&A filed an amended complaint. Unless otherwise indicated, the above facts are derived from this amended version.

new and used Mitel products from Authorized Dealers, dealers in foreign countries, unauthorized dealers and end users and resells this equipment to end users. Additionally, A&A Connections services Mitel PBX systems. A&A Connections applied to become a Mitel Authorized Dealer but was turned down.

To expand into the new PBX systems market A&A Connections entered into a joint venture with a Vietnamese Company, Cua Viet ("Cua Viet") to market PBX systems in Vietnam. A&A Connections also entered into an agreement with PCS International ("PCS") under which PCS agreed to provide marketing support for the sale of PBX equipment in Vietnam. FTI was formed to acquire new PBX systems on behalf of A&A Connections. In January 1996 FTI entered into a dealership agreement ("Dealership Agreement") with Mitel-Far East for the primary purpose of obtaining new PBX systems to supply the joint venture in Vietnam. Section 2.1 of the Dealership Agreement stated "It is a fundamental condition of this Agreement that FTI will not sell any Product [new Mitel PBX systems] to customers outside of Vietnam." In early 1997 Mitel learned that, contrary to the limits of section 2.1, FTI was importing PBX systems purchased under the Dealership Agreement into the United States. Consequently, Mitel terminated the Dealership Agreement and commenced this litigation on June 23, 1997. (Complaint ¶¶ 30-41).

After termination of the Dealership Agreement, in June 1997, Mitel-Far East and PCS entered into a distribution agreement ("Distribution Agreement") under which PCS would distribute Mitel systems in Vietnam.<sup>2</sup> Section 2.7 of the Distribution Agreement contained the following restriction:

"The Distributor [PCS] shall not sell the Products [PBX systems] to any customer which is outside the Territory [Vietnam] or within the Territory if to the knowledge of the Distributor that customer intends to resell the Products in any country which is outside of the Territory. . . should any Products be exported from Vietnam with the knowledge of Distributor (knowledge being defined as "knew or should have reasonably known under the circumstances") then the Distributor agrees to pay Mitel liquidated damages in the amount equal to 33% of the purchase price plus investigative costs and attorneys fees not to exceed US \$25,000 for each violation. . . ."

Pursuant to the Distribution Agreement, PCS ordered four Mitel PBX systems and related equipment and paid to Mitel-Far East \$149,063.50. A&A alleges that PCS's order was actually made on behalf of non-party Franz Telecom Investments, Inc. ("FTI, Inc.") and that FTI, Inc. prepaid PCS for the equipment. Before filling the order Mitel discovered PCS's plans to deliver the equipment to FTI, Inc. for resale in the United States. Based on this information, Mitel-Far East terminated the Distribution Agreement, refused to deliver the ordered equipment and retained \$82,874.25 of PCS's payment. Nothing in the record

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<sup>2</sup> It is unclear whether at the time of execution of the Distribution Agreement Mitel was aware of any relationship among A&A Connections, PCS, FTI and Franz Telecom Investments, Inc.

or pleadings indicate that A&A Connections was affected by the Distribution Agreement.

## **II. Standard of Review**

A claim may be dismissed under Rule 12(b)(6) only if it appears beyond a reasonable doubt that the plaintiff could prove no set of facts in support of the claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering such a motion, a court must accept all of the facts alleged in the complaint in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Additionally, when reviewing antitrust claims the dismissal standard is elevated because motive and intent play leading roles, thus the "proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System Inc., 368 U.S. 464, 473 (1962). Nonetheless, this court has previously acknowledged that it will not shy away from dismissing antitrust claims that are vague and conclusory in nature. See Rototherm v. Penn Linen & Uniform Service, Inc., 1997 WL 419627 (E.D.Pa. Jul. 3, 1997)(citations omitted).

## **III. A&A's Antitrust Counterclaims**

Counts I through IV are permissive counterclaims containing general allegations that Mitel's exclusive

distribution practices in the United States violate federal antitrust laws. Mitel argues that all four antitrust claims must be dismissed as A&A has failed to adequately plead antitrust injury. Specifically, Mitel claims that A&A has alleged only individual harm, which is not protected under relevant antitrust law.

It is clear that under those portions of the Sherman and Clayton Acts presently at issue, individual harm is irrelevant -- consumer protection is the primary concern. In antitrust cases, a plaintiff must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Alberta Gas Chemicals Ltd. v. E.I. du Pont De nemours and Co., 826 F.2d 1235, 1240 (3d Cir. 1987) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). In other words, because "antitrust law aims to protect competition, not competitors, [a court] must analyze the antitrust injury question from the viewpoint of the consumer." Alberta Gas, 826 F.2d at 1241. "An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services," not just his own welfare. Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 728 (3d Cir. 1991).

Mitel is correct, in part. A&A's allegations and argument focus on harm suffered by independent PBX brokers,

specifically A&A Connections. However, ¶ 157 of A&A's Complaint, alone, contains the requisite allegation of harm to consumers. Paragraph 157 alleges that as a result of Mitel's actions "[t]he ultimate end-users of Mitel PBX systems have been injured by not being able to buy the replacement and/or add-on parts from independent brokers [e.g. A&A Connections] and by not being able to choose a service and/or maintenance provider other than Mitel authorized distributors." Accepting as true A&A's allegations and all reasonable inferences therefrom I conclude that these allegations are sufficient to survive a motion to dismiss because the exclusion alleged constitutes antitrust injury. See Schuykill Energy Resources, Inc. v. Pennsylvania Power & Light Company, 113 F.3d 405, 418 (3d Cir. 1997); Brader v. Allegheny General Hospital, 64 F.3d 869, 876 (3d Cir. 1995)(The existence of antitrust injury is not typically resolved through motions to dismiss). Thus, I turn to Mitel's specific arguments.

**A. Count I: Unreasonable Restraint of Trade**

A&A alleges that Mitel's practice of selling PBX equipment only through Authorized Dealers has unreasonably restrained trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Specifically, that Mitel and its Authorized Dealers have conspired together to elevate unreasonably prices for replacement parts, add-on, and up-grades and thus exclude

competitors such as A&A Connections from the Mitel PBX parts market within the United States.

To establish a § 1 violation for unreasonable restraint of trade, a plaintiff must prove (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. See Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1996)(citations omitted).

Mitel counters that A&A's claim must be dismissed because the goal of their practice of using only to Authorized Dealers is "procompetitive." The company argues that the existence of a network of Mitel dealers who provide valuable service to end user increases goodwill among end users and makes Mitel more competitive. Mitel explains that its Authorized Dealers "employ skilled and fully trained technicians who are fully qualified to properly install and maintain Mitel brand PBX systems, and who adhere to strict industry and customer satisfaction standards."

Mitel is correct; courts have recognized the procompetitive effects of limiting distribution of a product to company authorized dealers. See e.g. Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Business Electronics v.

Sharp Electronics, 485 U.S. 717, 721 (1988) Yet, at this early stage, without the benefit of discovery, Mitel's mere allegations that its relationship with its Authorized Dealers is "procompetitive" is insufficient to refute A&A's claim of antitrust injury. A determination as to the nature of the effect Authorized Dealers have on the relevant market, namely whether they do, as Mitel suggests, actually increase customer satisfaction can only be made through discovery. Therefore, Mitel's motion, as it pertains to Count I, is denied.

**B. Counts II and III: Monopolization or Attempted Monopolization**

A&A claims that it competes with Mitel Authorized Dealers in the United States market for replacement Mitel PBX system parts, upgrades, repairs and add-ons and that Mitel has unlawfully monopolized (Count II) or attempted to unlawfully monopolize (Count III) such market.

The offense of monopoly under § 2 of the Sherman Act, 15 U.S.C. § 2, has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historical accident." Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481 (1992)(citations omitted). To state a claim for attempted monopolization, a plaintiff must allege that "(1) Defendant had engaged in

predatory conduct or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power." Ideal Dairy Farms Inc., v. John Labatt Ltd., 90 F.3d 737, 750 (3d Cir. 1996).

Mitel challenges the adequacy of A&A's relevant market description. Mitel claims that A&A's proposed market is too narrow because it is limited to only a single brand; replacement parts, upgrades, repair service and add-ons for Mitel PBX systems in the United States.

The outer bounds of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Brown Shoe Co. v. U.S., 370 U.S. 294, 325 (1962). In certain limited situations a product market may consist of only a single brand. For example, in Eastman Kodak, the Supreme Court held that the market for repair parts and services for Kodak photocopiers was a valid relevant market because repair parts and services for Kodak machines were not interchangeable with the service and parts used to fix copiers. Kodak, 504 U.S. at 482. Thus, in circumstances where the product or service is unique and therefore not interchangeable with other products or services, the single brand can constitute the relevant market. Id.; See also Queen City Pizza Inc., 124 F.3d at 439. A&A alleges, and Mitel does not refute, that add-ons, upgrades, replacement parts

for Mitel's PBX systems must be manufactured by Mitel. Other PBX parts are not compatible with Mitel's PBX systems. Therefore, for purposes of surviving Mitel's motion to dismiss A&A's market definition is sufficient and its claims of monopolization and attempted monopolization are adequately pled.

**C. Count IV: Tying**

A&A claims that as a precondition to purchase, consumers of Mitel PBX systems and parts are required to use only the installation, maintenance and repair services of Authorized Dealers. A&A states "Mitel and Mitel-USA have accordingly tied the sale of Mitel PBX systems, subsystems and component parts (the tying products) to the use of its Authorized Dealers' installation and maintenance services (the tied products)."

Whether brought under § 1 of the Sherman Act or § 3 of the Clayton Act, the essential elements of a tying claim are the same. See Borschow Hospital & Medical v. Cesar Castillo, 96 F.3d 10, 17 n.5 (1st Cir. 1996); Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1988). A "tying arrangement" is unlawful where (1) the scheme in question involves two distinct items and provides that one (the tying product) may not be obtained unless the other (the tied product) is also purchased. Times-Picayune Publishing Co. v. U.S., 345 U.S. 594, 613-14 (1953); (2) the tying product possesses sufficient economic power to appreciably restrain competition in the tied

product market. Northern Pacific R. Co. v. United States, 356 U.S. 1, 6 (1957); and (3) a "not insubstantial" amount of commerce, must be affected by the arrangement. International Salt Co. v. United States, 332 U.S. 392 (1947). Finally, like many circuits, this circuit requires that the manufacturer of the tying product must garner some economic benefit from the tying arrangement. Venezie Corp. v. United States Mineral Products Co. Inc., 521 F.2d 1309, 1317 (3d Cir. 1975).

Mitel correctly notes that A&A fails to meet this final requirement. Absent from A&A's Complaint is any indication that Mitel, the manufacturer of the tying products, directly benefited from its dealers maintenance contracts. From the pleadings it is clear that only Mitel's Authorized Dealers received compensation for maintenance and repair services they performed. Therefore, because Mitel does not share in the profits derived from maintenance contracts that its dealers sell, it does not have a direct economic interest in the tied market as contemplated by Venzie. Consequently, A&A has failed to state a tying claim and Count IV of A&A's Complaint is dismissed.

#### **IV. FTI, Inc.'s Motion to Intervene**

Presently FTI, Inc. seeks to intervene for purposes of asserting four state law counterclaims against Mitel which

have been included in A&A's Complaint.<sup>3</sup> A&A initially attempted to gain access into this lawsuit for FTI, Inc. by simply adding FTI, Inc.'s name to the caption of its state law counterclaims. Thus, because they were asserted, in part, by a non-party who had not intervened, Mitel sought dismissal of the claims. Consequently, FTI, Inc. filed this motion for intervention.

A&A's Complaint contains two state law claims brought on behalf of A&A and FTI, Inc., Count V: tortious interference with contractual relations and Count VI: tortious interference with business relations (the "tortious interference claims") and two state law claims brought by FTI, Inc. alone, Counts VII: breach of contract and Count VIII: conversion (the "contract claims").

Though FTI, Inc., references several rules of civil procedure (13, 19 and 20) it is evident that Rule 24 governs its intervention request. FTI, Inc., admits as much as its motion is aptly captioned "Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24." Furthermore, it is evident and FTI, Inc. makes no assertion otherwise, that section (b) of the rule, which allows for permissive intervention, is applicable.

Rule 24(b) provides, in relevant part,

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<sup>3</sup> FTI and FTI, Inc are two distinct entities. As evidenced by public corporate records attached to Mitel's opposition to intervention, FTI is a registered fictitious name under which A&A Connections does business and FTI, Inc. is a separate corporation.

"Upon timely application anyone may be permitted to intervene in an action . . . when applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Because FTI, Inc.'s counterclaims lack factual and legal commonality with the main action and/or would further confound an already complex matter, FTI, Inc.'s request for intervention is denied.

Despite vague and obscure wording the tortious interference claims revolve around termination of the Distribution and Dealership Agreements. The contract claims relate only to the Distribution Agreement. Circumstances surrounding termination of the Dealership Agreement are at issue in the main action. Therefore, insofar as the tortious interference claims relate to the Dealership Agreement common questions of law and fact exist. However, this commonality is irrelevant to FTI, Inc.'s present motion as FTI, Inc. has no connection with the Dealership Agreement. FTI, Inc. was not a party to the agreement (parties to the agreement were only FTI and Mitel-Far East) and has not alleged that it was in any way affected by enforcement or termination of the agreement.

All four counterclaims reference the Distribution Agreement, which has some facts in common with the main action (both involve contracts for PBX systems to which Mitel-Far East

is a party). This commonality, however, is not dispositive. Intervention under 24(b) is discretionary and in this instance slight factual commonality does not outweigh the undue complication assertion of FTI, Inc.'s Distribution Agreement claims would create. See Vol 6 Moore's Federal Practice, § 24.00 et. seq. (Matthew Bender 3d ed. 1997). This litigation already involves issues of antitrust, copyright and patent law. Therefore, to add to this heap litigation over an extraneous contract, which has no bearing on disposition of the main action and does not even involve the main defendant, A&A Connections, would only further complicate an already complex matter. See Wright, Miller and Kane, 7C Federal Practice and Procedure 2d § 1913 (1986 & Supp. 1997)(In denying intervention, courts may take into account in exercising their discretion the complicating effect of additional issues). Accordingly, FTI, Inc.'s motion to intervene is denied.<sup>4</sup>

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<sup>4</sup> Additionally, Mitel argues that as a general rule federal courts should deny permission to intervene when, as in FTI, Inc.'s case, the intervenor seeks only to assert counterclaims. Mitel's position is based on Judge Bechtle's decision in Hubner v. Schoonmaker which concluded that Rule 24 was not designed to allow parties to interject affirmative interests into a lawsuit through counterclaims. Hubner v. Schoonmaker, 18 Fed. R. Serv. 3d. 741; 1990 WL 149207 at \*7 (E.D.Pa. 1990). In reaching this conclusion, Judge Bechtle relied on the following excerpt from chapter 24.17 of volume 3A of the second edition of Moore's Federal Practice:

"[T]he desire of the petitioner to present a counterclaim or to add new parties may be one reason for denying intervention if the right to intervene is only discretionary. The fact that the intervenor's 'position is essentially aggressive' . . . may be one reason for denying intervention. The addition of new issues and new parties may be considered contrary to orderly procedure. . . . [T]he court may properly deny or limit permissive intervention (continued...)

## V. Remaining State Law Counterclaims

The only remaining claims to review are A&A's tortious interference counterclaims, Counts V and VI, both of which Mitel argues have been insufficiently pled. Neither party disputes that Pennsylvania law governs.

### A. Count V: Tortious Interference with Contractual Relations

To state a claim for tortious interference with contractual relations, a claimant must allege the following four elements: (1) a contractual relation; (2) a purpose or intent to harm the claimant by preventing that relationship from developing; (3) the absence of any privilege or justification on the part of the defendant; and (4) damage resulting from defendants' conduct. Gundlach v. Reinstein, 924 F.Supp. 684, 693 (E.D.Pa. 1996).

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<sup>4</sup>(...continued)

where it feels that the interposition of counterclaims not related to the matters at issue between the plaintiff and defendant would unduly delay or complicate the determination of those issues."

Id. (citing 3A Moore's Federal Practice, § 24.17 (Matthew Bender 1987)).

Though several other federal courts have also based denial of a motion to intervene on § 24.17, Moore's editors chose to omit the section from the third edition of Moore's Federal Practice which was published in 1997. See Medd v. Westcott, 32 F.R.D. 25 (N.D.Iowa 1963); Beard-Laney v. Pressley, 18 F.R.D. 162 (W.D.S.C. 1955); Kauffman v. Kerbert, 16 F.R.D. 225 (W.D.Pa. 1955); Vol.6 Moore's Federal Practice § 24.00 et. seq. (Matthew Bender 1997). Nevertheless, I find Judge Bechtel's decision sound and applicable.

Mitel also argues that litigation between Mitel Far-East and PCS over termination of the Distribution Agreement is currently underway in Hong Kong, therefore, it is more appropriate for FTI, Inc. to seek intervention in that suit. Without evidentiary support of such litigation I refrain from passing on what if any impact such litigation would have on FTI, Inc.'s current motion.

A&A claims that Mitel intentionally interfered with its contractual relationship with nonpartys PCS and Cua Viet by terminating the Dealership Agreement with FTI without justification, thereby rendering FTI and A&A Connections unable to perform their contractual obligations to PCS and Cua Viet. A&A alleges that prior to the Dealership Agreement, Mitel gave FTI oral permission to resell systems parts in the United States and therefore Mitel's subsequent termination of Dealership Agreement was a "set-up" designed to disparage FTI's good name. As a result A&A Connections and FTI have incurred damages. Based on the above I find that A&A has made the requisite bare bones allegations and therefore Count V survives Mitel's 12(b)(6) motion.

**B. Count VI: Tortious Interference with Business Relations**

The key to a tortious interference with business relations claim is demonstration by plaintiff of defendant's intent to destroy plaintiff's good will and reputation. Rototherm, 1997 WL 419627 \*14; Chrysler Credit Corp. v. B.J.M., Jr., Inc., 834 F.Supp. 813, 843 (E.D.Pa. 1993). Where a defendant's breach of contract with the plaintiff has only an incidental consequence of affecting plaintiff's business relationships with third persons, an action lies only in contract for defendant's breaches. Id. (citations omitted).

A&A alleges, in relevant part, that Mitel "acted with the specific intent to harm [their] business reputation" and that "the willful and intentional actions of [Mitel] were calculated to cause damage. . . ." Taken together with its allegations regarding the "set up" of FTI, it is clear that A&A has pled the relevant elements of its claim and therefore Mitel's motion as it pertains to Count VI is denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MITEL CORPORATION;	:	CIVIL ACTION
MITEL INC.;	:	
MITEL (FAR EAST) LIMITED,	:	NO. 97-cv-4205
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
A&A CONNECTIONS INC.,	:	
d/b/a TELEQ and d/b/a	:	
FRANZ TELECOM INVESTMENTS;	:	
ANDREW F. SILVERMAN,	:	
	:	
Defendants.	:	

O R D E R

AND NOW, this 19th day of March 1998, upon  
consideration of:

(1) Plaintiffs' 12(b)(6) motion to dismiss (Docket No. 14); Defendants' response (Docket No. 17); Plaintiffs' reply (Docket No. 18); Defendants' sur-reply (Docket No. 19); Plaintiffs' response to Defendants' sur-reply (Docket No. 21) and Defendants' supplemental reply to Plaintiffs' response (Docket No. 23); and

(2) Non-party, Franz Telecom Investments, Inc.'s motion to intervene (Docket No. 20); Plaintiffs' response (Docket No. 22); Franz Telecom Investments, Inc.'s reply (Docket No. 24);

it is hereby ordered that Plaintiffs' motion to dismiss is **GRANTED**, in part, and **DENIED**, in part. Accordingly, counterclaims IV, VII and VIII of Defendants' Amended Complaint (Docket No. 16) are dismissed. It is further ordered that Franz Telecom Investments, Inc.'s motion to intervene is **DENIED**.

BY THE COURT:

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RONALD L. BUCKWALTER, J.